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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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PERKINS COIE LLP PATENT-SEA P.O. BOX 1247 SEATTLE, WA 98111-1247			EXAMINER KARDOS, NEIL R	
			ART UNIT	PAPER NUMBER
			4172	
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			01/18/2008	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/647,975

Applicant(s)

KUMAR ET AL.

Examiner

Neil R. Kardos

Art Unit

4172

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 26 August 2003.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-36 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-36 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO/SF/ICE)
Paper No(s)/Mail Date 9/22/05
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

This is a non-final first Office action on the merits. Currently, claims 1-36 are pending.

Claim Rejections - 35 USC § 101

Claims 26-36 are rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter.

Claims 26-36 recite functional descriptive material (i.e. computer program) that does not impart functionality when employed as a computer component because the functional descriptive material is not tangibly embodied on a computer-readable medium. (See MPEP 2106.01(I)).

These claims are directed to "one or more computer memories collectively containing [a]... data structure...." Because this data structure is not tangibly embodied on a computer-readable medium, these claims are directed to non-statutory subject matter.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 26-30 and 32-36 are rejected under 35 U.S.C. 102(e) as being anticipated by U.S. pre-grant publication number 2003/0004781 to Mallon et al ("Mallon")

As per claim 26, Mallon discloses one or more computer memories collectively containing an item purchasing activity forecasting data structure comprising, for a selected item, for each of a series of past times, an indication of a level of item browsing activity observed to take place with respect to the selected item, such that the contents of the data structure may be used to project future purchasing activity with respect to the selected item (see paragraphs 30-31 and 40-42).

As per claim 27, Mallon discloses wherein each indication is a count of the total number of times an item detail web page containing information about the selected item was requested from one or more web servers from which the item detail page is available (see paragraph 42).

As per claim 28, Mallon discloses wherein each indication is a count of the total number of item browsing events observed to take place with respect to the selected item (see paragraphs 41 and 48).

As per claim 29, Mallon discloses wherein each of a plurality of different item browsing actions may be performed with respect to the selected item, and wherein each indication is a weighted score based upon the number of times each of the item browsing actions were observed to take place with respect to the selected item (see paragraphs 36 and 41).

As per claim 30, Mallon discloses wherein the data structure contains indications of levels of item browsing activity observed to take place at each of the series of past times with respect to each of a plurality of items, such that the contents of the data structure may be used to project future purchasing activity with respect to any of the plurality of items (see paragraphs 41-42, 48, 88).

As per claim 32, Mallon discloses wherein the each indication for a past time contained by the data structure comprises, for each of a plurality of different item browsing action types, a count of the total number of actions of the item browsing action type observed to take place at the past time (see paragraph 65).

As per claim 33, Mallon discloses one or more computer memories collectively containing an item purchasing activity forecast data structure comprising, for a selected item, for each of a series of future times, an indication of a level of purchasing activity expected to take place with respect to the selected item, based at least in part upon a quantification of browsing activity previously observed with respect to the selected item (see paragraphs 48 and 88).

As per claim 34, Mallon discloses wherein the data structure contains indications of levels of purchasing activity expected to take place at each of the series of future times with respect to each of a plurality of items, based at least in part upon a quantification of browsing activity previously observed with respect to the plurality of items (see paragraphs 48 and 88).

As per claim 35, Mallon discloses wherein the indications contained by the data structure are also based upon a quantification of purchasing activity previously observed with respect to the selected item (see paragraph 83).

As per claim 36, Mallon discloses one or more computer memories collectively containing a browsing action weighting data structure comprising, for each of a plurality of different types of item browsing actions, a indication of a weight to be attributed to item browsing actions of the type in projecting future demand based upon the occurrences of item browsing actions of the type (see paragraph 36).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-2, 6-18, and 20-25 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. pre-grant publication number 2002/0169657 to Singh et al ("Singh") in view of U.S. patent number 7,295,990 to Braumoeller et al ("Braumoeller").

As per claims 1 and 6, Singh discloses a method and computer-readable medium for projecting future purchasing activity for a selected item, comprising:

compiling historical purchasing data indicating, for each of a plurality of foregoing time periods, a level of item purchasing activity performed with respect to the selected item (see paragraph 47: lines 9-15, disclosing using compiled historical point-of-sale or customer order data to create a forecast; paragraph 52: lines 6-8, disclosing a demand history database);

generating from the compiled historical purchasing data a second projection of future purchasing activity levels with respect to the selected item (see id. above; see also paragraph 48: lines 5-10, disclosing determining a best forecast model; paragraph 52: lines 19-23); and

blending the generated first and second projections of future purchasing activity levels with respect to the selected item to generate a third projection of future purchasing activity levels with respect to the selected item (see figure 2, depicting combining

various "history streams" to create a forecast model; see paragraph 47: lines 9-15; paragraph 42: lines 1-11; paragraph 43: lines 1-6).

While Singh discloses compiling historical data for a particular item and using that data to generate a projection of future purchasing activity levels with respect to that item, Singh does not explicitly disclose wherein the data is browsing data.

Braumoeller teaches using browsing data to identify potential orders (see column 4: lines 17-22).

Thus, the combination of Braumoeller and Singh teaches compiling historical browsing data indicating, for each of a plurality of foregoing time periods, a level of item browsing activity performed with respect to the selected item; and generating from the compiled historical browsing data a first projection of future purchasing activity levels with respect to the selected item. These limitations are met by using the browsing data taught by Braumoeller as one of the history streams taught by Singh (see Singh, figure 2: item 202).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to use the browsing data taught by Braumoeller as one of the history streams in the invention of Singh. One of ordinary skill in the art would have been motivated to do so in order to enhance the future fulfillment process for expected future orders (see Braumoeller, column 1: lines 7-12) and to determine the best forecast for a particular product (see Singh, paragraph 48: lines 5-10).

As per claim 2, Singh discloses a method further comprising placing a resupplying order for the selected item based upon the third projection (see paragraph 93: lines 7-12, disclosing

using the forecast in manufacturing planning; paragraph 99: lines 3-6, disclosing using the forecast to determine supply; paragraphs 3-4).

As per claims 7 and 23, Singh discloses a method and system for projecting future purchasing activity for a selected item being offered for sale by a merchant, comprising:

retrieving data indicating, during each of a plurality of past time periods, an observed level of activity performed by users with respect to the selected item (see paragraph 47: lines 9-15, disclosing gathering compiled historical point-of-sale or customer order data to create a forecast; paragraph 52: lines 6-8, disclosing a demand history database); and

transforming the retrieved data into a projection of future purchasing activity at the merchant for the selected item (see id. above; see also paragraph 48: lines 5-10, disclosing determining a best forecast model; paragraph 52: lines 19-23).

Singh does not disclose wherein the activity is browsing activity. However, Braumoeller teaches using browsing data to identify potential orders (see column 4: lines 17-22).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to use the browsing activity taught by Braumoeller as one of the history streams in the invention of Singh. One of ordinary skill in the art would have been motivated to do so in order to enhance the future fulfillment process for expected future orders (see Braumoeller, column 1: lines 7-12) and to determine the best forecast for a particular product (see Singh, paragraph 48: lines 5-10).

As per claim 8, Singh discloses wherein the transforming produces a projection of future purchasing activity specifying an anticipated level of purchasing activity for each of a plurality of future time periods (see page 10: tables 2 and 3).

As per claim 9, Singh discloses wherein the transforming comprises using the retrieved data to generate a projection of future activity performed at the merchant with respect to the selected item (see page 10: tables 2 and 3).

Singh does not disclose wherein the activity is browsing activity. However, Braumoeller teaches using browsing data to identify potential orders (see column 4: lines 17-22).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to use the browsing activity taught by Braumoeller as one of the history streams in the invention of Singh. One of ordinary skill in the art would have been motivated to do so in order to enhance the future fulfillment process for expected future orders (see Braumoeller, column 1: lines 7-12) and to determine the best forecast for a particular product (see Singh, paragraph 48: lines 5-10).

Singh also does not disclose using the generated projection of future browsing activity to predict future purchasing activity at the merchant for the selected item. However, Braumoeller teaches this limitation (see column 4: lines 17-22).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to combine the browsing activity taught by Braumoeller into the forecasting models of Singh. One of ordinary skill in the art would have been motivated to do so in order to determine the best possible forecast for a particular product (see Singh: paragraph 48: lines 5-10).

As per claim 10, Singh discloses wherein the projection is generated using time-series forecasting techniques (see figures 4A-4D, disclosing using seasonal effects on time-series data; paragraph 5).

As per claim 11, Singh discloses wherein the projection of future activity generated is a time-series of values characterizing future activity at each of a plurality of future times (see figures 4A-4D; paragraph 5; page 10: tables 2-3), and wherein future purchasing activity is predicted by applying a time-series of conversion ratios based upon conversion history at the merchant (see figure 4C, applying seasonal conversion ratios to data).

Singh does not disclose wherein the activity is browsing activity. However, Braumoeller teaches using browsing data to identify potential orders (see column 4: lines 17-22).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to use the browsing activity taught by Braumoeller as one of the history streams in the invention of Singh. One of ordinary skill in the art would have been motivated to do so in order to enhance the future fulfillment process for expected future orders (see Braumoeller, column 1: lines 7-12) and to determine the best forecast for a particular product (see Singh, paragraph 48: lines 5-10).

As per claim 12, Singh discloses wherein the merchant operates a web site (see paragraph 3, disclosing using the invention in conjunction with an e-business), and wherein a web log is produced in connection with the operation of the web site, further comprising:

extracting activity data from the produced web log (see figure 3: 301a-c; paragraph 52,
disclosing storing the activity data in a database); and
storing the extracted data for retrieval (see id.).

Singh does not disclose wherein the activity is browsing activity. However, Braumoeller teaches using browsing data to identify potential orders (see column 4: lines 17-22).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to use the browsing activity taught by Braumoeller as one of the history streams in the invention of Singh. One of ordinary skill in the art would have been motivated to do so in order to enhance the future fulfillment process for expected future orders (see Braumoeller, column 1: lines 7-12) and to determine the best forecast for a particular product (see Singh, paragraph 48: lines 5-10).

As per claim 13, Singh discloses wherein the merchant operates a physical store, further comprising:

capturing activity data within the physical store (see paragraph 3: 301a-c; paragraph 52); and
storing the captured data for retrieval (see id.).

Singh does not disclose wherein the activity is browsing activity. However, Braumoeller teaches using browsing data to identify potential orders (see column 4: lines 17-22).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to use the browsing activity taught by Braumoeller as one of the history streams in the invention of Singh. One of ordinary skill in the art would have been motivated to do so in order to enhance the future fulfillment process for expected future orders (see Braumoeller, column 1: lines 7-12) and to determine the best forecast for a particular product (see Singh, paragraph 48: lines 5-10).

As per claim 14, Singh does not disclose the limitations. Braumoeller, however, teaches wherein the merchant operates a plurality of locations at which the selected item is available for purchase, and wherein the transforming is performed to produce a projection of future purchasing activity specifying an anticipated level of purchasing activity for each of the plurality of merchant locations (see column 4: lines 56-67 through column 5: lines 1-8, disclosing modeling expected future orders by distribution center).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to expand the invention of Singh to encompass multiple locations as taught by Braumoeller. One of ordinary skill in the art would have been motivated to do so in order to distribute resources across locations as necessary (see Braumoeller: column 2: lines 47-57).

As per claim 15, Singh does not disclose the limitations. Braumoeller, however, teaches wherein each of the locations operated by the merchant is a shipping center, and wherein, for each shipping center, the anticipated level of purchasing activity is determined using browsing activity data from customers whose shipping address is associated with the shipping center (see column 4: lines 56-67 through column 5: lines 1-8, disclosing modeling expected future orders by distribution center; see column 4: lines 17-22, disclosing determining the anticipated level of purchasing activity based on browsing data; see column 2: lines 47-57, disclosing distributing orders based on the customer's proximity to the distribution center).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to use distribution centers as taught by Braumoeller as the locations disclosed in the invention of Singh. One of ordinary skill in the art would have been motivated to do so in order to distribute resources across locations as necessary (see Braumoeller: column 2: lines 47-57).

As per claim 16, Singh does not disclose the limitations. Braumoeller, however, teaches wherein each of the locations operated by the merchant is a shipping center, and wherein, for each shipping center, the anticipated level of purchasing activity is determined using browsing activity data from customers whose shipping address is associated with any of the shipping center (see column 4: lines 56-67 through column 5: lines 1-8, disclosing modeling expected future orders by distribution center; see column 4: lines 17-22, disclosing determining the anticipated level of purchasing activity based on browsing data; see column 2: lines 47-57, disclosing distributing orders based on the customer's proximity to the distribution center).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to use distribution centers as taught by Braumoeller as the locations disclosed in the invention of Singh. One of ordinary skill in the art would have been motivated to do so in order to distribute resources across locations as necessary (see Braumoeller: column 2: lines 47-57).

As per claims 17 and 18, Singh does not disclose the limitations. Braumoeller, however, teaches using the projection of future purchasing activity to specify an operational parameter used to operate the merchant, and wherein the operation parameter is inventory reorder level for the selected item (see figure 9).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to use the forecasting techniques of Singh to adjust company operations and inventory management as taught by Braumoeller. One of ordinary skill in the art would have been motivated to do so in order to determine if inventory is expected to be exhausted and to replenish supply (see column 29: lines 3-11)

As per claim 20, Singh does not disclose the limitations. Braumoeller, however, teaches wherein the specifying operation parameter is staffing level (see column 28: lines 14-19).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to use the forecasting techniques of Singh to adjust company operations and staffing levels as taught by Braumoeller. One of ordinary skill in the art would have been motivated to do so in order to assist in planning for future orders (see Braumoeller: column 28: lines 14-19).

As per claim 21, Singh discloses wherein the retrieved data indicates an observed level of activity performed by the user at the merchant (see paragraph 47: lines 9-15, disclosing gathering compiled historical point-of-sale or customer order data to create a forecast).

Singh does not disclose wherein the activity is browsing activity. However, Braumoeller teaches using browsing data to identify potential orders (see column 4: lines 17-22).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to use the browsing activity taught by Braumoeller as one of the history streams in the invention of Singh. One of ordinary skill in the art would have been motivated to do so in order to enhance the future fulfillment process for expected future orders (see Braumoeller, column 1: lines 7-12) and to determine the best forecast for a particular product (see Singh, paragraph 48: lines 5-10).

As per claim 22, Singh discloses incorporating into the projection of future purchasing activity data indicating, during each of a plurality of past time periods, an observed level of purchasing activity performed by users with respect to the selected item (see paragraph 47: lines 9-15, disclosing using compiled historical point-of-sale or customer order data to create a forecast; paragraph 52: lines 6-8, disclosing a demand history database).

As per claim 24, Singh discloses wherein the retrieval subsystem retrieves data indicating an observed level of activity performed by users at the merchant's web site (see figure 3: 301a-c; paragraph 52, disclosing storing and extracting the activity data from a database; see paragraph 3, disclosing using the invention with an e-business).

Singh does not disclose wherein the activity is browsing activity. However, Braumoeller teaches using browsing data to identify potential orders (see column 4: lines 17-22).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to use the browsing activity taught by Braumoeller as one of the history streams in the invention of Singh. One of ordinary skill in the art would have been motivated to do so in order to enhance the future fulfillment process for expected future orders (see Braumoeller, column 1: lines 7-12) and to determine the best forecast for a particular product (see Singh, paragraph 48: lines 5-10).

As per claim 25, Singh discloses wherein the retrieval subsystem retrieves data indicating an observed level of browsing activity performed by users at a plurality of web sites, including the merchant's web site (see paragraph 3, disclosing using the invention with an e-business; figure 1: item 103, depicting gathering information from a variety of locations).

Claims 3-5 are rejected under 35 U.S.C. 103(a) as being unpatentable over Singh and Braumoeller as discussed above, and further in view of U.S. patent number 6,745,150 to Breiman ("Breiman").

As per claim 3, Singh discloses a method wherein the first, second, and third projections of future purchasing activity levels each specify a level of purchasing activity with respect to the

selected item during each of a plurality of target time periods following the foregoing time periods (see page 10: tables 2 and 3), the method further comprising determining that an external event occurred that is likely to have influenced the level of item purchasing activity performed with respect to the selected item during a selected one of the plurality of target time periods (see paragraph 55).

Singh and Braumoeller do not explicitly disclose the remainder of the limitations of this claim.

Breiman teaches wherein the blending comprises, for each of the plurality of target time periods:

weighting the level specified by the first projection relative to the level specified by the second projection (see column 4: lines 6-12), and
combining the levels specified by the first and second projections in accordance with their weights (see id.),
wherein the weighting for the selected target time period downgrades the weight of the level specified by the second projection relative to the level specified by the first projection (see id.).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to combine the weighting method of Breiman with the forecasting methods of Singh and Braumoeller. One of ordinary skill in the art would have been motivated to do so in order to obtain a more accurate forecast (see Breiman: column 1: lines 58-60).

As per claim 4, Singh discloses wherein the external event determined to have occurred is an external event that is likely to have limited the availability of the selected item (see paragraph

81: lines 5-9, disclosing variations in demand due to unusual market conditions; see also paragraph 55: lines 32-37; paragraph 56: lines 11-15; paragraph 58: lines 9-19).

As per claim 5, Singh discloses wherein the external event determined to have occurred is an external event that is likely to have prevented the purchase of the selected item (see *id.*).

Claim 19 is rejected under 35 U.S.C. 103(a) as being unpatentable over Singh and Braumoeller as discussed above, and further in view of U.S. patent number 6,912,505 to Linden et al (“Linden”)

As per claim 19, Braumoeller teaches using the projection of future purchasing activity to specify an operation parameter used to operate the merchant, and wherein the operation parameter is inventory reorder level for the selected item, as discussed in the claim 17-18 rejection above. Neither Braumoeller nor Singh teach wherein the inventory reorder level is for an item identified as a complement of the selected item.

Linden teaches using a user's browsing activities to determine that user's interest in related items (see figure 2; column 2: lines 51-67).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to determine inventory replenishment routines as taught by Braumoeller for complement items as taught by Linden. One of ordinary skill in the art would have been motivated to do so in order to determine if inventory is expected to be exhausted and to replenish supply (see column 29: lines 3-11)

Claim 31 is rejected under 35 U.S.C. 103(a) as being unpatentable over Mallon as discussed above, and further in view of U.S. patent number 7,295,990 to Braumoeller et al ("Braumoeller")

As per claim 31, Mallon discloses wherein in the data structure is organized in such a manner that the plurality of items are ranked in descending order of their indications of levels of item browsing activity (see paragraphs 36 and 82-86).

Mallon does not explicitly disclose wherein the contents of the data structure may be used to determine a relative level of urgency for restocking the items of the plurality.

Braumoeller teaches using the projection of future purchasing activity to specify an inventory reorder level for the selected item (see figure 9).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to use the forecasting techniques of Mallon to manage inventory as taught by Braumoeller. One of ordinary skill in the art would have been motivated to do so in order to determine if inventory is expected to be exhausted and to replenish supply (see column 29: lines 3-11)

Double Patenting

Claims 1, 7, 9-13, and 21-25 of this application conflict with claims 1-12 of Application No. 10/830860. 37 CFR 1.78(b) provides that when two or more applications filed by the same applicant contain conflicting claims, elimination of such claims from all but one application may be required in the absence of good and sufficient reason for their retention during pendency in more than one application. Applicant is required to either cancel the conflicting claims from all

but one application or maintain a clear line of demarcation between the applications. See MPEP § 822.

Claims 1, 7, 9-13, and 21-25 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 1-12 of copending Application No. 10/830860. Although the conflicting claims are not identical, they are not patentably distinct from each other because eliminating limitations from the claims of the reference application would have been obvious to one of ordinary skill in the art at the time the invention was made.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the “right to exclude” granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re*

Vogel, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Neil R. Kardos whose telephone number is (571)270-3443. The examiner can normally be reached on Mon-Thu and alternating Fridays from 7:30 to 5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Tom Dixon can be reached on (571) 272-6803. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/THOMAS A DIXON/
Supervisory Patent Examiner, Art Unit 4172

Neil R. Kardos
Examiner
Art Unit 4172

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1/17/08